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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 NATHAN CLARK,) Civil No. 10cv02149 AJB(RBB)
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13) Petitioner,)
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15) v.)
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17) L.S. MCEWEN,)
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19) Respondent.)
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16 Petitioner Nathan Clark, a state prisoner proceeding pro se
17 and in forma pauperis, filed a Petition for Writ of Habeas Corpus
18 on October 12, 2010, pursuant to 28 U.S.C. § 2254 [ECF Nos. 1, 3].¹
19 Clark alleges that officials at Calipatria State Prison
20 ("Calipatria") issued three consecutive rules violations for the
21 same offense relating to job performance, which resulted in the
22 improper "stacking" of overlapping violations to enhance the
23 discipline. (Pet. 6-9, ECF No. 1) As a result, Clark was deprived
24 of a total of ninety days of good time and work credits – thirty
25 days for each violation. (Id. at 7.) Petitioner maintains that
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28 ¹ Because the Petition, Answer, and Traverse are not
consecutively paginated, the Court will cite to them using the page
numbers assigned by the electronic case filing system.

1 the sixty-day credit loss for the subsequent violations constitutes
2 an "illegal sentence," in violation of his rights to due process
3 and equal protection. (Id. at 6-8.) Clark also requests an
4 evidentiary hearing. (Id. at 1.)

5 On December 30, 2010, Respondent L.S. McEwen, warden, filed an
6 Answer to Petition for Writ of Habeas Corpus as well as a Notice of
7 Lodgment [ECF No. 6]. There, McEwen contends that the Court should
8 deny federal habeas relief because Clark's claims are procedurally
9 defaulted, and the Petition was not filed within the one-year
10 statute of limitations prescribed by the Antiterrorism and
11 Effective Death Penalty Act ("AEDPA"). (Answer 6, ECF No. 6.)
12 Alternatively, if the Court considers the Petition on its merits,
13 Respondent contends that Clark fails to state a cognizable federal
14 claim and does not allege a prima facie claim for relief. (Id.)

15 The Petitioner filed a Traverse along with exhibits on January
16 28, 2011 [ECF No. 7]. Clark insists that his claims are not
17 procedurally defaulted, the Petition is not barred by AEDPA's
18 one-year statute of limitations, and he sufficiently alleges a
19 federal question and states a prima facie case. (Traverse 14-16,
20 21, ECF No. 7.)

21 The Court has reviewed the Petition, Respondent's Answer and
22 lodgments, and the Traverse. For the reasons discussed below,
23 Clark's Petition should be **DENIED**.

24 I. FACTUAL BACKGROUND

25 Petitioner alleges that prison officials at Calipatria issued
26 three consecutive rules violation reports relating to his job
27 performance and imposed three separate credit forfeitures for the
28 same offense, which is against the California Department of

1 Corrections and Rehabilitation ("CDCR") policy that prohibits
2 "stacking." (Pet. 6-7, ECF No. 1.) Clark submits that he was
3 employed as a "3rd watch program office porter," which is a paid
4 position. (Id. at 13; Traverse 4, ECF No. 7.) On July 20, 2005,
5 Petitioner was given a rules violation for failing to comply with
6 section 3041(a) of the California Code of Regulations. (Pet. 7,
7 13, ECF No. 1.) He was specifically cited for ignoring his
8 supervising officer's orders to perform on four different
9 occasions. (Id. at 13.) In light of Clark's job performance on
10 July 20, 2005, as well as his numerous other rules violations for
11 job performance, the reporting officer requested that Petitioner be
12 taken to "ICC" and removed from his job assignment. (Id.)

13 The next day, on July 21, 2005, Clark received a second rules
14 violation, this one was for failing to report to work, in violation
15 of section 3041(a). (Id. at 14.) The citing officer noted that
16 Clark had received violations on February 6, and June 2, 2005, for
17 the same conduct. (Id.) Once again, the correctional officer
18 requested that Petitioner be taken to ICC and removed from his job
19 assignment. (Id.)

20 The following day, July 22, 2005, Clark received the third
21 rules violation, again, this one was for refusing to report for
22 work, in violation of section 3041(a). (Id. at 15.) Correctional
23 Officer Mejia noted that Clark had received violations on February
24 6, June 2, and June 21, 2005, for the same conduct. (Id.) Again,
25 the correctional officer requested that Petitioner be taken to ICC
26 and removed from his job assignment. (Id.)

27 On July 25, 2005, a hearing was held regarding the first rules
28 violation issued on July 20, 2005, for Clark's refusal to perform

1 his job duties while at work. (Lodgment No. 2, Rules Violation
2 Report 2, July 25, 2005.) Although Petitioner pleaded not guilty,
3 he was ultimately found guilty of violating section 3041 for the
4 specific act of "performance," a division "F" offense. (Id.)
5 Clark was assessed a thirty-day forfeiture of credits, reprimanded
6 about program expectations, and advised of future behavioral
7 expectations. (Id. at 3.)

8 On August 9, 2005, a hearing was held for the second rules
9 violation issued on July 21, 2005, for Clark's refusal to report
10 for work. (Lodgment No. 3, Rules Violation Report 4, Aug. 9,
11 2005.) Petitioner pleaded guilty to the charge of violating
12 section 3041(a) due to his job "performance," as a division "F"
13 offense. (Id.) He was assessed a thirty-day forfeiture of
14 credits, including thirty days of forfeited phone, yard, and
15 dayroom access. (Id.; see Pet. 7, ECF No. 1.) Clark was also
16 counseled about program and behavioral expectations. (Lodgment No.
17 3, Rules Violation Report 4.) The Petitioner was also "referred to
18 UCC with recommendation for: Removal from assignment and placement
19 [o]n C-STATUS: For Program Failure Review." (Id.)

20 Approximately ten minutes later on August 9, 2005, a
21 disciplinary hearing was held on the third rules violation issued
22 on July 22, 2005, also for Clark's failure to report to work.
23 (Lodgment No. 4, Rules Violation Report 2, Aug. 9, 2005.) The
24 Petitioner pleaded guilty to violating section 3041(a) for his
25 "performance" and was assessed an additional thirty-day forfeiture
26 of credits as a division "F" offense; this included a thirty-day
27 loss of phone, yard, and dayroom access. (Id.) Clark was also
28 lectured about program expectations. (Id.)

1 On January 10, 2010, nearly five years after the disciplinary
2 hearings were held, Clark submitted an inmate grievance asserting
3 that the sixty-day credit loss for the July 21 and 22, 2005
4 violations was the result of improper "stacking" for the same
5 offense. (See Pet. 8, 28, ECF No. 1.) This grievance was screened
6 out as untimely on January 12, 2010, pursuant to section 3084.6(c)
7 of the California Code of Regulations. (Id. at 27.) The appeals
8 coordinator indicated that if Petitioner would like to pursue the
9 matter further, he must submit an explanation and supporting
10 documentation describing why he did not or could not file his
11 grievance in a timely manner. (Id.)

12 The Petitioner resubmitted the same grievance, received one
13 week later, on January 20, 2010, along with an excuse for the more
14 than four-year lapse between the 2005 hearing and his appeal. (Id.
15 at 28, 32; see Traverse 9, ECF No. 7.) Clark explained that he had
16 been unaware of CDCR's policy against "stacking" until the time
17 that he filed his initial grievance. (Pet. 32, ECF No. 1.) He
18 alleged that the hearing officer should have recognized the
19 improper "stacking" and concluded that time bars do not apply to
20 challenges of unauthorized sentences. (Id.) Petitioner's appeal
21 was screened out at the second level on January 20, 2010, as
22 untimely. (Id. at 30.) The appeals coordinator wrote, "Your
23 response has been noted, however, your appeal remains untimely, and
24 will not be accepted. Please do not resubmit." (Id.) Clark did
25 not submit this claim to the third level of review.

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II. PROCEDURAL BACKGROUND

On February 18, 2010, Clark filed a petition for writ of habeas corpus with the California Superior Court for the County of Imperial, alleging due process violations arising from prison officials' "stacking" of the three instances of rules violations. (Id. at 44.) The court denied the petition on March 19, 2010, because it was untimely, and Clark failed to account for the significant delay in filing the state petition. (Id. (citing In re Clark, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993)).)

Next, Clark filed a petition with the California Supreme Court, which was summarily denied on August 18, 2010. (Id. at 42.) The court cited In re Robbins, 18 Cal. 4th 770, 780, 959 P.2d 311, 317, 77 Cal. Rptr. 2d 152, 159-60 (1998), and In re Dexter, 25 Cal. 3d 921, 603 P.2d 35, 160 Cal. Rptr. 118 (1979). (Id.)

Clark filed this federal Petition on October 12, 2010 [ECF No. 1].

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C.A. § 2244 (West 2006), applies to all federal habeas petitions filed after April 24, 1996. Woodford v. Garceau, 538 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). AEDPA sets forth the scope of review for federal habeas corpus claims:

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C.A. § 2254(a) (West 2006); see also Reed v. Farley, 512 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991). Because Clark's Petition was filed on October 12, 2010, AEDPA applies to this case. See Woodford, 538 U.S. at 204.

In 1996, Congress "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Amended § 2254(d) now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

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(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West 2008).

To present a cognizable federal habeas corpus claim, a state prisoner must allege that his conviction was obtained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner must allege that the state court violated his federal constitutional rights. Hernandez, 930 F.2d at 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

A federal district court does "not sit as a 'super' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 786 F.2d 697, 700 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (holding that federal habeas courts must respect a state

1 court's application of state law); Jackson, 921 F.2d at 885
 2 (explaining that federal courts have no authority to review a
 3 state's application of its law). Federal courts may grant habeas
 4 relief only to correct errors of federal constitutional magnitude.
 5 Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989)
 6 (stating that federal courts are not concerned with errors of state
 7 law unless they rise to level of a constitutional violation).

8 The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003),
 9 stated that "AEDPA does not require a federal habeas court to adopt
 10 any one methodology in deciding the only question that matters
 11 under § 2254(d)(1) -- whether a state court decision is contrary
 12 to, or involved an unreasonable application of, clearly established
 13 Federal law." (Id. at 71) (citation omitted). In other words, a
 14 federal court is not required to review the state court decision de
 15 novo. (Id.) Rather, a federal court can proceed directly to the
 16 reasonableness analysis under § 2254(d)(1). (Id.)

17 The "novelty" in § 2254(d)(1) is "the reference to 'Federal
 18 law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd
 19 on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1)
 20 "explicitly identifies only the Supreme Court as the font of
 21 'clearly established' rules." (Id.) "[A] state court decision may
 22 not be overturned on habeas corpus review, for example, because of
 23 a conflict with Ninth Circuit-based law." Moore, 108 F.3d at 264.
 24 "[A] writ may issue only when the state court decision is 'contrary
 25 to, or involved an unreasonable application of,' an authoritative
 26 decision of the Supreme Court." (Id.) (citing Childress v.
 27 Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997); Devin v. DeTella, 101

1 F.3d 1206, 1208 (7th Cir. 1996); Baylor v. Estelle, 94 F.3d 1321,
2 1325 (9th Cir. 1996).)

3 Furthermore, with respect to the factual findings of the trial
4 court, AEDPA provides:

5 In a proceeding instituted by an application for a
6 writ of habeas corpus by a person in custody pursuant to
7 the judgment of a State court, a determination of a
8 factual issue made by a State court shall be presumed to
be correct. The applicant shall have the burden of
rebutting the presumption of correctness by clear and
convincing evidence.

9 28 U.S.C.A. § 2254(e)(1).

10 IV. DISCUSSION

11 In his Petition, Clark maintains that his second and third
12 rules violations should have been dismissed under the CDCR policy
13 against stacking. (Pet. 6-9, ECF No. 1) Petitioner concedes that
14 the thirty-day forfeiture of time and work credit was appropriate,
15 but he argues that the sixty-day credit loss that was imposed for
16 the second and third violations was "illegal" and violated his
17 rights to due process and equal protection. (Id. at 6-8.) He also
18 requests an evidentiary hearing. (Id. at 1.)

19 Warden McEwen contends that Clark is not entitled to federal
20 habeas relief because his claims are procedurally defaulted and
21 untimely. (Answer 6, ECF No. 6.) Even if the Court considered the
22 Petition on its merits, Respondent alleges, it should be denied
23 because Clark has not stated a cognizable federal claim and does
24 not allege a prima facie claim. (Id.)

25 A. One-Year Statute of Limitations

26 The Respondent maintains that Clark's Petition is barred by
27 the one-year statute of limitations set forth in § 2244(d). (Id.
28 at 8.) The CDCR's administrative grievance procedures require that

1 inmates file a grievance within fifteen working days of the event
2 giving rise to the complaint. (Id. at 9 (citing Cal. Code Regs.
3 tit. 15, § 3084.6(c) (amended 2011)).) Because Petitioner
4 challenges the sanctions resulting from the disciplinary hearings
5 on August 9, 2005, McEwen maintains that Clark learned about the
6 loss of custody credits the same date of the hearings. (Id. at 8-
7 9.) For habeas petitions that challenge administrative decisions,
8 AEDPA states that a petition must be filed within one year from the
9 date on which the judgment became final by the conclusion of direct
10 review, or the expiration of the time for seeking such review.
11 (Id. at 8 (quoting 28 U.S.C. § 2244(d)(1)).) Therefore, Respondent
12 asserts that the statute of limitations for Clark's claim began to
13 run on August 30, 2005, when the time to seek review expired, which
14 was fifteen working days after he was advised of the loss of
15 credits. (Id. at 9, n.7.) The limitations period expired one year
16 later on August 30, 2006. (Id. at 9.) Thus, McEwen contends that
17 Clark filed his federal Petition on October 12, 2010, or 1,499 days
18 after the statute had run. (Id.)

19 In his Traverse, Petitioner insists that his claim is not
20 barred by AEDPA's one-year statute of limitations because it
21 challenges an "illegal sentence," and it is therefore not subject
22 to the statute. (Traverse 15, ECF No. 7 (citation omitted).)
23 Clark also maintains that he was diligent because once he learned
24 of the newly discovered evidence from another inmate, he filed an
25 administrative grievance. (See id.)

26 The statute of limitations for federal habeas corpus petitions
27 is set forth in § 2244(d), which provides in relevant part:

28 (1) A 1-year period of limitation shall apply to an
application for a writ of habeas corpus by a person in

1 custody pursuant to the judgment of a State court. The
 2 limitation period shall run from the latest of --

3 (A) the date on which the judgment became final by
 4 the conclusion of direct review or the expiration of
 5 the time for seeking such review;

6 (B) the date on which the impediment to filing an
 7 application created by State action in violation of
 8 the Constitution or laws of the United States is
 9 removed, if the applicant was prevented from filing
 10 by such State action;

11 (C) the date on which the constitutional right
 12 asserted was initially recognized by the Supreme
 13 Court, if the right has been newly recognized by the
 14 Supreme Court and made retroactively applicable to
 15 cases on collateral review; or

16 (D) the date on which the factual predicate of the
 17 claim or claims presented could have been discovered
 18 through the exercise of due diligence.

19 28 U.S.C.A. § 2244(d)(1).

20 It is appropriate to dismiss a federal petition for writ of
 21 habeas corpus with prejudice when it was not filed within the
 22 AEDPA's one-year statute of limitations. Jiminez v. Rice, 276 F.3d
 23 478, 483 (9th Cir. 2001). Statute of limitations issues must be
 24 resolved before the merits of individual claims. White v.
 25 Klitzkie, 281 F.3d 920, 921-22 (9th Cir. 2002).

26 1. Start Date

27 AEDPA's one-year statute of limitations applies to habeas
 28 petitions challenging administrative decisions. Mardesich v. Cate,
 2012 U.S. App. LEXIS 3362, at *17 (9th Cir. Feb. 21, 2012); Shelby
v. Bartlett, 391 F.3d 1061, 1063 (9th Cir. 2004); Redd v. McGrath,
 343 F.3d 1077, 1080 n.4 (9th Cir. 2003). Specifically, subsection
 (D) of § 2244(d)(1) governs petitions attacking administrative
 disciplinary rulings. Mardesich, 2012 U.S. App. LEXIS 3362, at
 *18; Shelby, 391 F.3d at 1066 (quoting Redd, 343 F.3d at 1081-83).
 In these cases, the statute of limitations begins to run on "the

1 date on which the factual predicate of the claim or claims
2 presented could have been discovered through the exercise of due
3 diligence." 28 U.S.C.A § 2244(d)(1)(D); see Mardesich, 2012 U.S.
4 App. LEXIS 3362, at *19; Shelby, 391 F.3d at 1066; Redd, 343 F.3d
5 at 1081-83. The statute may be tolled under 28 U.S.C. §
6 2244(d)(2).

7 [T]he date of the "factual predicate" for [petitioner's]
8 claim under § 2244(d)(1)(D) is not determined by asking
9 when [petitioner] satisfied AEDPA's exhaustion
10 requirement; rather it is determined independently of the
11 exhaustion requirement by inquiring when [petitioner]
12 could have learned of the factual basis for his claim
13 through the exercise of due diligence.

14 Redd, 343 F.3d at 1084. "Time begins when the prisoner knows (or
15 through diligence could discover) the important facts, not when the
16 prisoner recognizes their legal significance." Hasan v. Galaza,
17 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (quoting Owens v. Boyd, 235
18 F.3d 356, 359 (7th Cir. 2000)).

19 Here, the disciplinary hearings for the July 21 and 22, 2005
20 rules violations took place on August 9, 2005. (Lodgment No. 3,
21 Rules Violation Report 4; Lodgment No. 4, Rules Violation Report
22 2.) The Petitioner did not file an administrative grievance
23 challenging the August 9, 2005 decisions until January 10, 2010,
24 nearly five years later, when Clark allegedly learned of the prison
25 policy against "stacking." (Pet. 8, 28, ECF No. 1.) That
26 grievance was screened out as untimely on January 12, 2010,
27 pursuant to section 3084.6(c) of the California Code of
28 Regulations, although Clark was permitted to submit an explanation
and documentation describing the reason for the delay. (Id. at
27.) Clark resubmitted the same grievance with an attached excuse
for the delay, which was received by the appeals office on January

1 20, 2010. (Id. at 28, 32.) Petitioner's resubmitted appeal was
2 screened out again on January 20, 2010, as untimely, and Clark was
3 informed that he should not resubmit the appeal. (Id. at 30.)

4 The Court must determine when the factual predicate for
5 Clark's improper stacking claim could have been discovered through
6 the exercise of due diligence. 28 U.S.C.A. § 2244(d)(1)(D). In
7 cases where the petitioner timely submits an administrative appeal
8 challenging the disciplinary decision, the factual predicate is
9 usually the day that the administrative decision becomes final,
10 subject to the petitioner receiving proper notice. Shelby, 391
11 F.3d at 1066 (holding that the statute of limitation did not begin
12 to run until the petitioner's administrative appeal had been
13 denied); Redd, 343 F.3d at 1084 (stating that the parole board's
14 denial of the inmate's administrative appeal was the "factual
15 predicate" that triggered the commencement of the limitations
16 period); Bridges v. Adams, No. S-08-2316 JAM GGH P, 2009 U.S. Dist.
17 LEXIS 16100, at *2-3 (E.D. Cal. Mar. 2, 2009); Perez v. Sisto, No.
18 S-07-0544 LKK DAD P, 2007 U.S. Dist. LEXIS 77509, at *10 (E.D. Cal.
19 Oct. 18, 2007). The Ninth Circuit recently held, "As a general
20 rule, the state agency's denial of an administrative appeal is the
21 'factual predicate' for such habeas claims." Mardesich, 2012 U.S.
22 App. LEXIS 3362, at *19 (footnote omitted). There is no indication
23 that the petitioner in Mardesich did not timely submit his
24 administrative appeal. See id. at *2-3, 23-24 (applying the rules
25 set forth in Shelby and Redd, which dealt with timely
26 administrative appeals).

27 Unlike the cases where the petitioner timely appealed the
28 parole board's decision, Clark did not timely appeal the two

1 disciplinary rulings that each imposed a thirty-day credit loss.
2 Therefore, the inquiry is whether the one-year statute of
3 limitations commenced on August 9, 2005, the date the disciplinary
4 hearings were held and rulings were made, or January 20, 2010, the
5 date Clark's administrative grievance was ultimately screened out
6 as untimely.

7 The Ninth Circuit has not expressly addressed when the factual
8 predicate for a claim could have been discovered if the petitioner
9 did not timely submit a grievance challenging the administrative
10 ruling. See Redd, 1084 n.11 (citing id. at 1081 n.6).
11 Nonetheless, many courts have held that the factual predicate under
12 this circumstance is the date that the administrative decision was
13 issued. Kimbrell v. Cockrell, 311 F.3d 361, 363 (5th Cir. 2002)
14 (finding that because the petitioner did not timely file a
15 grievance after the administrative decision, the limitations period
16 began to run on the date that the decision was made, not when the
17 untimely appeal was ruled on); Edwards v. Small, No. 10CV918-
18 JM(JMA), 2011 U.S. Dist. LEXIS 27448, at *6-7, 11-12 (S.D. Cal.
19 Feb. 18, 2011) (stating that the limitations period commenced on
20 the date of the disciplinary hearings because petitioner's
21 grievance was ultimately screened out as untimely and was therefore
22 never administratively reviewed); see also Duke v. Marshall, No. CV
23 09-05888-GHK(SH), 2010 U.S. Dist. LEXIS 50071, at *9-10 n.8 (C.D.
24 Cal. Mar. 9, 2010) (filing superior court petition before
25 administrative appeal became final); Hecker v. Hubbard, No. S-07-
26 1511 FCD GGH P, 2008 U.S. Dist. LEXIS 76126, at *7-8 (E.D. Cal.
27 Aug. 27, 2008) (using latest rejection date as "untimely" to
28 trigger limitations); Strack v. Campbell, No. S-07-0580 RRB DAD P,

1 2007 U.S. Dist. LEXIS 93232, at *16-17 (E.D. Cal. Dec. 19, 2007)
2 (same); Somers v. Schwartz, No. S-05-1454 LKK DAD P, 2007 U.S.
3 Dist. LEXIS 74991, at *21-23 (E.D. Cal. Oct. 9, 2007) (holding that
4 petitioner timely appealed, so the date he received a screening
5 notice improperly dismissing his appeal as untimely triggered the
6 limitations period); but see Waiwaiole v. Kane, No. C 04-3790
7 SI(pr), 2005 U.S. Dist. LEXIS 10052, at *5 (N.D. Cal. May 9, 2005)
8 (acknowledging that the limitations period would have started on
9 the date that the parole decision became final because that was the
10 factual predicate for the habeas claim).

11 The disciplinary hearings Clark challenges were never
12 administratively reviewed. See Edwards, 2011 U.S. Dist. LEXIS
13 27448, at *11-12. The Petitioner knew that he was being assessed a
14 sixty-day credit forfeiture for the two rules violations for
15 refusing to report to work on August 9, 2005, the date of the
16 hearings. See Kimbrell, 311 F.3d at 364. Although the timely
17 pendency of administrative grievance procedures would have tolled
18 the one-year limitations period, Clark did not file his first
19 grievance until nearly five years after the disciplinary hearings.
20 See id. Petitioner discovered the factual predicate of his claims
21 arising from these two hearings on August 9, 2005, the date that
22 both hearings were held. See Edwards, 2011 U.S. Dist. LEXIS 27448,
23 at *11. AEDPA's statute of limitations therefore commenced on
24 August 30, 2005, and expired one year later on August 31, 2006.
25 See id. Because Clark did not file a state habeas corpus petition
26 until February 18, 2010, his claim is untimely by more than three
27 years.

28

1 The Petitioner is also not entitled to a delayed accrual date
2 under § 2244(d)(1)(D). Hasan, 254 F.3d at 1154 n.3 (discussing
3 that the limitations period commences when the petitioner knows, or
4 through diligence could discover, the important facts, not when the
5 petitioner understands their legal import); Flanagan v. Johnson,
6 154 F.3d 196, 198-99 (5th Cir. 1998) (noting that § 2244(d)(1)(D)
7 does not permit an extended delay while a prisoner gathers "every
8 possible scrap of evidence" that could support his contentions);
9 see also Waiwaiole, 2005 U.S. Dist. LEXIS 10052, at *8 n.2. Clark
10 knew on August 9, 2005, that he was being assessed a sixty-day
11 forfeiture of credit on top of his initial thirty-day forfeiture,
12 and he knew what had occurred during the two disciplinary hearings.
13 See Waiwaiole, 2005 U.S. Dist. LEXIS 10052, at *8 n.2. The
14 Petitioner's subsequent acquisition of information that was helpful
15 to his claim does not justify a later start date of the limitations
16 period. Id.

17 **2. Statutory Tolling**

18 McEwen asserts that Clark is not entitled to statutory tolling
19 because he did not file his state habeas petitions until long after
20 the statute of limitations had run. (Answer 9, ECF No. 6.)
21 According to Respondent, Petitioner delayed more than four years
22 from the disciplinary hearings before filing his state habeas
23 petition on February 18, 2010. (Id. at 10.) The state supreme
24 court denied a subsequent habeas petition as untimely. (Id.)
25 Moreover, Clark's federal habeas petition was mailed to the Court
26 on October 7, 2010, which is 1,499 days after the statute of
27 limitation expired. (Id.) Petitioner does not address whether he
28 is entitled to statutory tolling.

1 The statute of limitations under AEDPA is tolled during
2 periods in which a "properly filed" habeas corpus petition is
3 "pending" in the state court. 28 U.S.C.A. § 2244(d)(2). The
4 statute specifically provides, "The time during which a properly
5 filed application for State post-conviction or other collateral
6 review with respect to the pertinent judgment or claim is pending
7 shall not be counted toward any period of limitation under this
8 subsection." Id.; see also Pace v. DiGuglielmo, 544 U.S. 408, 410
9 (2005). "[A]n application is 'properly filed' when its delivery
10 and acceptance are in compliance with the applicable laws and rules
11 governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000)
12 (explaining that typical filing requirements include all relevant
13 time limits).

14 The interval between the disposition of one state petition and
15 the filing of another may be tolled under "interval tolling."
16 Carey v. Saffold, 536 U.S. 214, 223 (2002). "[T]he AEDPA statute
17 of limitations is tolled for 'all of the time during which a state
18 prisoner is attempting, through proper use of state court
19 procedures, to exhaust state court remedies with regard to a
20 particular post-conviction application.'" Nino v. Galaza, 183 F.3d
21 1003, 1006 (9th Cir. 1999) (quoting Barnett v. Lamaster, 167 F.3d
22 1321, 1323 (10th Cir. 1999)); see also Carey, 536 U.S. at 219-22.
23 The statute of limitations is tolled from the time a petitioner's
24 first state habeas petition is filed until state collateral review
25 is concluded, but it is not tolled before the first state
26 collateral challenge is filed. Thorson v. Palmer, 479 F.3d 643,
27 646 (9th Cir. 2007) (citing Nino, 183 F.3d at 1006).

28

1 In this case, the disciplinary hearings in question took place
2 on August 9, 2005, and Clark did not file his habeas petition with
3 the superior court until February 18, 2010. The petition was
4 therefore filed four and one-half years after the disciplinary
5 hearings on August 9, 2005, and three and one-half years after
6 AEDPA's one-year statute of limitations expired on August 31, 2006.
7 A subsequently filed petition for state collateral relief cannot
8 revive an expired statute of limitations. Pace, 544 U.S. at 417;
9 see also Jiminez v. Rice, 276 F.3d at 482; Green v. White, 223 F.3d
10 1001, 1003 (9th Cir. 2000). Therefore, the statute of limitations
11 for Clark was not tolled for the period between August 31, 2006,
12 the date the limitations period expired, and February 18, 2010, the
13 date the first state habeas petition was filed. See Pace, 544 U.S.
14 at 417.

15 3. Equitable Tolling

16 The Respondent also submits that Clark is not entitled to
17 equitable tolling. (See Answer 10-12, ECF No. 6.) McEwen concedes
18 that Petitioner appears to be arguing that equitable tolling
19 applies because California law allows courts to correct an
20 "unauthorized sentence" at any time. (Id. at 11.) According to
21 Respondent, this argument is misplaced because Clark is appealing
22 prison disciplinary action, not a criminal sentence. (Id.)
23 Further, Petitioner provides no authority to support his contention
24 that state law trumps the federal statute of limitations. (Id.)
25 McEwen challenges Clark's alternative argument that he was unaware
26 of the prison policy against "stacking" until he reviewed another
27 inmate's rules violation dated August 11, 2008. (Id. at 11-12.)
28 Respondent argues that it is unclear when he reviewed this

1 violation, or why he waited until October 7, 2010, to file his
2 Petition. (Id. at 12.)

3 Petitioner does not expressly argue that he is entitled to
4 equitable tolling or that any extraordinary circumstance precluded
5 his timely filing. He does, however, repeatedly assert that he did
6 not know of the illegality of the disciplinary decisions until
7 December 2009 or January 2010, when another inmate informed him of
8 the policy. (Compare Pet. 46, ECF No. 1 (indicating that he
9 learned of the illegality of stacking "[a]round January 2010"),
10 with Traverse 7, ECF No. 7 (stating that he was made aware of the
11 CDCR policy against stacking on December 3, 2009).) Clark alleges
12 that another prisoner showed him the inmate's three similar rules
13 violations for job performance from August 2008, where the first
14 violation was adjudicated but the subsequent two were properly
15 dismissed pursuant to the prison's anti-stacking policy. (Traverse
16 8, ECF No. 7.) Petitioner maintains that there was a smaller gap
17 in time between the three violations in his case than in the other
18 inmate's. (Id.) Clark argues that after learning this, he
19 diligently pursued his claims through the state administrative
20 grievance process as well as the state courts. (Id. at 14.)
21 Moreover, Petitioner asserts that his claim is not subject to
22 AEDPA's statute of limitations because he is challenging an illegal
23 sentence. (Id. at 8, 15.) The Petitioner cites three California
24 cases, In re Birdwell, 50 Cal. App. 4th 926, 930, 58 Cal. Rptr. 2d
25 244, 246 (1996), In re Harris, 5 Cal. 4th 813, 855 P.2d 391, 21
26 Cal. Rptr. 373 (1993), and In re Ward, 64 Cal. 2d 672, 414 P.2d
27 400, 51 Cal. Rptr. 272 (1966).

28

1 Equitable tolling of the statute of limitations is appropriate
2 when the petitioner can show "(1) that he has been pursuing his
3 rights diligently, and (2) that some extraordinary circumstance
4 stood in his way." Holland v. Florida, __ U.S. __, __, 130 S. Ct.
5 2549, 2554 (2010); Pace, 544 U.S. at 418; see also Lawrence v.
6 Florida, 549 U.S. 327, 335 (2007); Rouse v. U.S. Dep't of State,
7 548 F.3d 871, 878-79 (9th Cir. 2008). A petitioner is entitled to
8 equitable tolling of AEDPA's one-year statute of limitations where
9 "'extraordinary circumstances beyond a prisoner's control made it
10 impossible'" to file a timely petition. Spitsyn v. Moore, 345 F.3d
11 796, 799 (9th Cir. 2003) (quoting Brambles v. Duncan, 330 F.3d
12 1197, 1202 (9th Cir. 2003)).

13 "[T]he threshold necessary to trigger equitable tolling
14 [under AEDPA] is very high, lest the exceptions swallow the rule."
15 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting
16 United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000)).
17 The failure to file a timely petition must be the result of
18 external forces, not the result of the petitioner's lack of
19 diligence. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
20 "Determining whether equitable tolling is warranted is a
21 'fact-specific inquiry.'" Spitsyn, 345 F.3d at 799 (quoting Frye
22 v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)).

23 Clark argues that he was not aware of the CDCR policy against
24 stacking until another inmate informed him about it nearly five
25 years after the disciplinary actions at issue, at which time he
26 diligently submitted a grievance. Yet, a lack of understanding of
27 the law does not constitute the extraordinary circumstances
28 required for equitable tolling. Jones v. Turner, 2011 U.S. App.

1 LEXIS 19064, at *3 (9th Cir. Sept. 14, 2011); Raspberry v. Garcia,
2 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] pro se petitioner's lack
3 of legal sophistication is not, by itself, and extraordinary
4 circumstance warranting equitable tolling."); see Perez v. Adams,
5 405 F. App'x 262, 263 (9th Cir. 2010) (finding that petitioner was
6 not entitled to equitable tolling due to his lack of legal
7 sophistication, his appellate counsel's abandonment of the case,
8 and other circumstances apparently out of his control); Marsh v.
9 Soares, 223 F.3d 1217, 1220 (10th Cir. 2000) ("[I]t is well
10 established that 'ignorance of the law, even for an incarcerated
11 pro se petitioner, generally does not excuse prompt filing.'").

12 Clark is not entitled to equitable tolling for his belated
13 awareness of CDCR's anti-stacking policy because he has not shown
14 that extraordinary circumstances beyond his control prevented him
15 from timely filing a petition. See Waiwai, 2005 U.S. Dist.
16 LEXIS 10052, at *7-8 (discussing petitioner's claim that he did not
17 know of the illegality of the parole board's decision until much
18 later, and finding that the belated discovery was insufficient to
19 warrant equitable tolling). Petitioner has not shown that he
20 exercised reasonable diligence in attempting to pursue
21 administrative or habeas relief after his disciplinary hearings.

22 Clark additionally argues that he can bring an illegal
23 sentence claim at any time. (See Pet. 47-48, ECF No. 1; Traverse
24 15, ECF No. 7.) The primary case he cites in support of the
25 proposition, however, is a California case addressing a state
26 habeas petition challenging a criminal conviction, whereas Clark is
27 bringing a federal habeas petition that challenges two disciplinary
28 actions. See In re Birdwell, 50 Cal. App. 4th at 930, 58 Cal.

1 Rptr. 2d at 246. In any event, federal courts routinely apply
2 AEDPA's statute of limitations to claims that a petitioner was
3 given an illegal sentence. See Murphy v. Idaho, Case No. CV
4 07-230-C-MHW, 2008 U.S. Dist. LEXIS 52279, at *3-10 (D. Idaho July
5 7, 2008); Pena v. Slaughter, No. CV 05-138-BLG-RWA, 2006 U.S. Dist.
6 LEXIS 48739, at *9 (D. Mont. May 12, 2006); see also United States
7 v. Fiorillo, No. CR-94-427-JLQ, 2006 U. S. Dist. LEXIS 71332, at
8 *7, 29-32 (N.D. Cal. Sept. 26, 2006) (applying statute of
9 limitations to § 2255 petition).

10 For all of these reasons, Clark's petition is time barred by
11 AEDPA's one-year statute of limitations. Neither statutory nor
12 equitable tolling apply to Petitioner's case. Habeas relief should
13 be **DENIED** on this basis alone.

14 **B. Procedural Default**

15 Even if Clark's Petition was not time barred, his claim is
16 procedurally barred. The warden contends that the state superior
17 court and the state supreme court expressly relied on adequate and
18 independent state procedural grounds - timeliness and
19 administrative exhaustion - when denying Clark's habeas petitions.
20 (Answer 7, ECF No. 6.) McEwen maintains that because Petitioner
21 failed to submit a timely petition and exhaust administrative
22 remedies, Clark is barred from seeking relief in federal court.
23 (Id. at 7-8.)

24 In response, Clark argues that his claims are not procedurally
25 defaulted because he properly presented all of his claims to the
26 necessary tribunals. (Traverse 14, ECF No. 7.) Petitioner alleges
27 that because he is challenging an illegal sentence, his claim can
28 never be untimely. (Id.) Just because the prison screened out his

1 grievance as untimely and the lower courts denied his state
2 petitions as untimely, it does not mean that he failed to exhaust
3 his remedies. (Id.) Clark maintains that his Petition is not
4 procedurally barred and should be considered on its merits. (Id.
5 at 14-15.)

6 "A federal habeas court will not review a claim rejected by a
7 state court 'if the decision of [the state] court rests on a state
8 law ground that is independent of the federal question and adequate
9 to support the judgment.'" Beard v. Kindler, 558 U.S. ___, ___, 130
10 S. Ct. 612, 614 (2009) (quoting Coleman v. Thompson, 501 U.S. 722,
11 729 (1991)). A habeas petitioner who has failed to comply with a
12 state's procedural requirements for presenting federal claims has
13 deprived the state courts of an opportunity to address the claims.
14 Coleman, 501 U.S. at 732 (citing 28 U.S.C.A. § 2254(b); Engle v.
15 Issac, 456 U.S. 107, 125-26, n.28 (1982)). "In order to constitute
16 adequate and independent grounds sufficient to support a finding of
17 procedural default, a state rule must be clear, consistently
18 applied, and well-established at the time of the petitioner's
19 purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir.
20 1994) (citing Ford v. Georgia, 498 U.S. 411, 424 (1991)).

21 The respondent has the burden of pleading an adequate and
22 independent procedural bar as an affirmative defense in a habeas
23 case. See Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003).
24 The burden of proof shifts to the petitioner to place that defense
25 in issue; the burden then shifts back to the respondent to prove
26 the bar is applicable. See id. at 586. "[A]bsent showings of
27 'cause' and 'prejudice,' federal habeas relief will be unavailable
28 when (1) 'a state court [has] declined to address a prisoner's

1 federal claims because the prisoner had failed to meet a state
2 procedural requirement,' and (2) 'the state judgment rests on
3 independent and adequate state procedural grounds.'" Walker v.
4 Martin, __ U.S. __, __, 131 S. Ct. 1120, 1127 (2011) (citations
5 omitted) (alteration in original).

6 A federal habeas court looks to the last reasoned state court
7 opinion to determine whether a petitioner's claim is procedurally
8 barred. Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999)
9 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). Here, the
10 superior court denied Clark's habeas petition on March 19, 2010,
11 because it was untimely and failed to account for the significant
12 delay in filing. (Pet. 44, ECF No. 1 (citing In re Clark, 5 Cal.
13 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509).) He did not seek
14 habeas relief from the California Court of Appeal; instead, he
15 filed a habeas petition with the state supreme court. It summarily
16 denied Clark's petition on August 18, 2010, citing cases indicating
17 that the bases for the denial were untimeliness and non-exhaustion.
18 (Id. at 42 (citing In re Robbins, 18 Cal. 4th at 780, 959 P.2d at
19 317, 77 Cal. Rptr. 2d at 159-60; In re Dexter, 25 Cal. 3d 921, 603
20 P.2d 35, 160 Cal. Rptr. 118).) Because the supreme court denied
21 the petitioner on state procedural grounds of timeliness and
22 exhaustion, Clark's federal claims are barred if either the
23 timeliness or exhaustion rule is adequate and independent.

24 1. Timeliness

25 a. Independence

26 A state procedural rule is independent when the "state law
27 basis for the decision [is] not . . . interwoven with federal law."
28 La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001) (footnote

omitted); see Harris v. Reed, 489 U.S. 255, 265 (1989). A state law basis is interwoven with federal law when "the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed.'" Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)).

In 1998, the California Supreme Court made it clear that California's timeliness rule was independent of federal law. See Bennett, 322 F.3d at 581-83; see also Townsend v. Knowles, 562 F.3d 1200, 1206-07 (9th Cir. 2009), abrogated on other grounds by Walker, __ U.S. __, 131 S. Ct. 1120. Accordingly, when the California Supreme Court summarily denied Clark's petition in 2010 citing In re Robbins, it did so on an independent procedural ground.

b. Adequacy

"To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" Walker, __ U.S. at __, 131 S. Ct. at 1127-28 (quoting Kindler, 558 U.S. at __, 130 S. Ct. at 612) (footnote omitted); see Hanson v. Mahoney, 433 F.3d 1107, 1112-13 (9th Cir. 2006). Prior to the Supreme Court's decision in Walker, the California timeliness rule, although independent, was not an adequate state ground to bar federal habeas relief. Townsend, 562 F.3d at 1208. In light of Walker, the law is clear that California's time bar is both adequate and independent.

The Supreme Court recently held that the timeliness requirement set forth in In re Robbins, the case cited by the state

1 supreme court when denying Clark's petition as untimely, is an
 2 adequate and independent state law ground to support a procedural
 3 default. See Walker, __ U.S. at __, 131 S. Ct. at 1124, 1130-31.
 4 Since then, the Ninth Circuit has applied Walker to pending cases
 5 and held that "denial of habeas relief by the California Supreme
 6 Court on the ground that the application for relief was filed
 7 untimely was an independent and adequate state procedural ground
 8 requiring denial of a subsequent habeas petition in federal court .
 9 . . ." Alvarez v. Wong, No. 09-15547, 2011 U.S. App. LEXIS 6976,
 10 at *2 (9th Cir. Apr. 5, 2011); see Haynes v. Haviland, No. 08-
 11 17755, 2011 U.S. App. LEXIS 11607, at *1-2 (9th Cir. June 7, 2011)
 12 (same); see also Martinez v. McGrath, No. CIV S-02-0159 KJM GGH P,
 13 2011 U.S. Dist. LEXIS 23664, *8 (E.D. Cal. Mar. 9, 2011)(applying
 14 Walker).

15 The California courts signal that a habeas petition is
 16 untimely by citing the controlling cases, such as In re Clark, 5
 17 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993) and In re
 18 Robbins. See Walker, __ U.S. at __, 131 S. Ct. at 1124. The three
 19 leading decisions outlining California's time bar are In re
 20 Robbins, In re Gallego, 18 Cal. 4th 825, 959 P.2d 290, 77 Cal.
 21 Rptr. 2d 132 (1998), and In re Clark. See Walker, __ U.S. at __,
 22 131 S. Ct. at 1125. "Those decisions instruct habeas petitioners
 23 to 'alleg[e] with specificity' the absence of substantial delay,
 24 good cause for delay, or eligibility for one of four exceptions to
 25 the time bar." Id. at 1128 (citations omitted).

26 Although Clark's charges became final in August 2005, when the
 27 disciplinary hearings took place, he did not file his state habeas
 28 petition in superior court until February 2010, and his subsequent

1 petition was not denied by the supreme court with a citation to In
2 re Robbins. California courts were regularly applying the time bar
3 long before Clark should have raised his claim with the California
4 courts. At the time Petitioner filed his first habeas petition
5 with the superior court in 2010 and the supreme court denied his
6 petition that same year, the timeliness rule had been consistently
7 applied by state courts. See Martinez, 2011 U.S. Dist. LEXIS
8 23664, at *9, 9 n.4 (construing Walker as finding the timeliness
9 bar an adequate and independent state ground since 2002).

10 The petitioner in Walker filed a habeas petition in the
11 California Supreme Court in March 2002, and it was denied in
12 September 2002. Walker, __ U.S. at __, 131 S. Ct. at 1126. The
13 Supreme Court examined California's time bar in 2002 and proximate
14 years and concluded that as of that time, the rule was consistently
15 applied. Id., __ U.S. at __, 131 S. Ct. at 1131; see also
16 Martinez, 2011 U.S. Dist. LEXIS 23664, at *11 (finding no change in
17 the time bar from 2002 to 2004). The timeliness rule was therefore
18 both independent and adequate at the time of Clark's default. See
19 Cox v. Small, 2011 U.S. App. LEXIS 25695, at *2 (9th Cir. Dec. 19,
20 2011).

21 Accordingly, the Petitioner is procedurally barred from
22 raising this claim in federal court because California's timeliness
23 rule is an adequate and independent state doctrine.

24 **c. Cause and prejudice**

25 A habeas petitioner who has failed to comply with a state rule
26 must establish cause and prejudice in order to obtain habeas relief
27 under federal law. Review of a petitioner's claim is precluded
28 unless he "can demonstrate cause for the default and actual

1 prejudice as a result of the alleged violation of federal law, or
 2 demonstrate that failure to consider the claim[] will result in a
 3 fundamental miscarriage of justice." Coleman, 501 U.S. at 749-50
 4 (citing Murray v. Carrier, 477 U.S. 478, 485 (1986)); see also High
 5 v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005). "[C]ause for a
 6 procedural default on appeal ordinarily requires a showing of some
 7 external impediment preventing counsel from constructing or raising
 8 the claim." Murray, 477 U.S. at 492; see McCleskey v. Zant, 499
 9 U.S. 467, 493 (1991) (discussing cause under abuse of writ
 10 doctrine); see also Coleman, 501 U.S. at 753.

11 Clark argues that his Petition is not procedurally barred
 12 because he is challenging an illegal sentence, which can be
 13 reviewed at any time. First, the sixty-day credit forfeiture is
 14 not equivalent to a sentence imposed after a criminal conviction.
 15 Second, Clark has not established that actual prejudice will result
 16 from a constitutional violation or that the failure to consider his
 17 claim on the merits will result in the fundamental miscarriage of
 18 justice. See Edwards, 2011 U.S. Dist. LEXIS 27448, at *28. The
 19 Petitioner has not met his burden of showing that the cause and
 20 prejudice exception should apply, and habeas relief should be
 21 **DENIED** for this additional reason. See Coleman, 501 U.S. at 750.

22 **C. Evidentiary Hearing**

23 Finally, Clark requests an evidentiary hearing. (Pet. 1, ECF
 24 No. 1.) He does not present any facts that would warrant an
 25 evidentiary hearing. See Insyxiengmay v. Morgan, 403 F.3d 657, 670
 26 (9th Cir. 2005) (stating that the petitioner must demonstrate he
 27 failed to develop the factual basis of his claims in state court);
 28 Townsend v. Sain, 372 U.S. 293, 313 (1963) (requiring the

petitioner to establish that one of the six factors applies to his case). Clark's request for an evidentiary hearing is therefore **DENIED**.

V. CONCLUSION

For the reasons set forth above, Clark did not file his federal Petition within AEDPA's one-year statute of limitations. The Petitioner is not entitled to a later start date or tolling. Additionally, Clark is procedurally barred from bringing his claim, and he has not established that the cause and prejudice exception applies to his case. Clark's Petition for Writ of Habeas Corpus should be **DENIED**. The request for an evidentiary hearing is **DENIED**.

This Report and Recommendation will be submitted to United States District Court Judge Anthony J. Battaglia, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the court and serve a copy on all parties on or before March 26, 2012. The document should be captioned, "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before April 9, 2012. The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

Dated: February 28, 2012



RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Battaglia
All parties of record